1963

Jack B. Wood and Shirl W. Hales v. North Salt Lake : Brief of Respondent on Appeal

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

JACK B. WOOD and
SHIRL W. HALES,
Plaintiffs-Appellants,

— vs. —

NORTH SALT LAKE,
a municipal corporation,
Defendant-Respondent.

Case
No. 9985

Respondent's Brief On Appeal

Appeal From a Judgment of the Second District Court
of Davis County,
HONORABLE THORNLEY K. SWAN, *Judge*

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STATEMENT OF THE KIND OF CASE

As stated in the Brief of Appellants, this is an action by plaintiffs for a Writ of Mandamus to compel the City of North Salt Lake to issue a building permit which would enable them to build a residence in the Paul Subdivision of North Salt Lake, Davis County, Utah.

DISPOSITION IN THE LOWER COURT

The case was tried on stipulated facts before the Honorable Thornley K. Swan, District Judge of the Second Judicial District and the Writ of Mandamus was denied.

RELIEF SOUGHT ON APPEAL

Appellants seek reversal of the decision of the trial court and the issuance of a Writ of Mandamus. The respondent asks that the judgment of the lower court be affirmed.

STATEMENT OF FACTS

The facts of this case were stipulated by the parties and the written stipulation of facts appears in the record beginning at page 7. Appellants have rewritten these facts in their brief and have inserted various statements that are not supported by the record. For this reason respondent will state the facts in the exact manner in which they were stipulated. These facts are as follows:

1. That on or about October 18, 1955, Louis J. Bowers Sr. and Ella C. Bowers, his wife, being then the owners of a tract of land in the Town of North Salt Lake, Davis County, subdivided said land into lots and streets, said subdivision now being known as "Paul Subdivision." That Exhibit "A" [see Figure 1], attached hereto, is a plat of said original subdivision.

2. That the Paul Subdivision was duly accepted by the Town Board of North Salt Lake on or about October 18, 1955, and the streets as shown in the plat were dedicated for the perpetual use of the public by the subdividers; that after approval by the municipal authorities the plat was duly recorded in the Recorder's Office of Davis County on the 18th day of October, 1955, as Entry No. 150887, in Book P or L & L, at Page 231.

PLAT OF ORIGINAL TRUE SUBDIVISION

3. That thereafter the subdivision was transferred to Modern Housing Corporation, a Utah corporation, and that certain subdivision improvements were made in said subdivision and certain homes were built on said subdivision.

4. That since the date of the approval of the subdivision up to and including the present time, the area of the subdivision as shown by the shaded portion of Exhibit "A" has remained undeveloped to the following extent:

(a) No homes or other buildings have been constructed in this area.

(b) No streets have been constructed in this area.

(c) No curb, gutter, sidewalk, paving or lighting has been installed in this area.

5. That the area of the subdivision represented by the shaded portion of Exhibit "A" has been developed to the following extent:

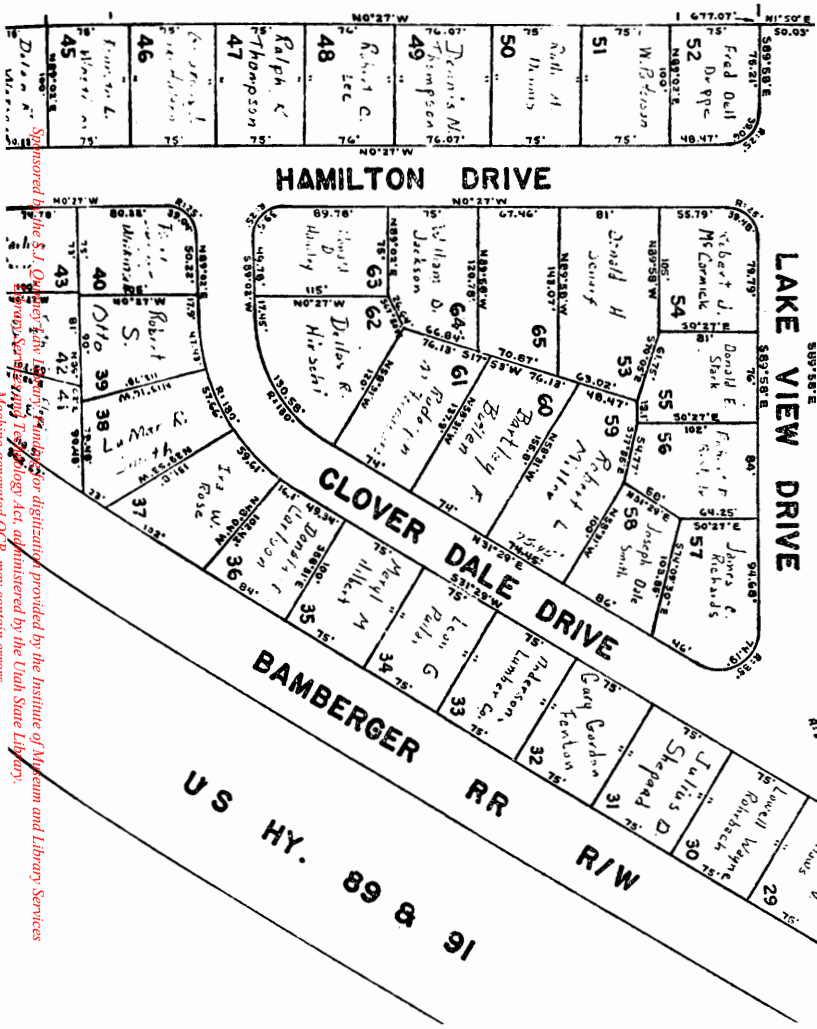
(a) That water mains were installed at the time the subdivision was approved and run in front of all lots.

(b) That water connection fees were paid to the Town of North Salt Lake for 26 of said lots in October of 1955.

(c) That in July of 1961 the South Davis County Sewer Improvement District installed sewer mains in this area and a connection tee was left to provide future service to the following lots: Lots 90-95, Lots 74-79, and Lots 16-19.

FIGURE 2 (EXHIBIT "B")

AMENDED PORTION OF PAUL SUBDIVISION



6. That the remaining portion of the subdivision was fully developed and that all of the subdivision and street improvements were completed, however, said portion of the subdivision was amended to the extent as shown on the amended plat, which is attached hereto as Exhibit "B" [see figure 2] and made a part of this stipulation.

7. That in January of 1963 plaintiffs, Jack B. Wood and Shirl W. Hales purchased from Modern Housing Corporation the following lots in Paul Subdivision: Lots 15-19, Lots 74-79, and Lots 90-95.

8. That on August 6, 1957, the Town Board of North Salt Lake duly enacted a comprehensive zoning ordinance and zoning plan for the Town of North Salt Lake; that the area surrounding and including the Paul Subdivision was zoned R-S for residential suburban use.

9. That Section 15-5-1 of the North Salt Lake Zoning Ordinance provides that the minimum lot area for any building lot in the R-S zone shall be 7,000 square feet.

10. That none of the lots as platted in the shaded portion of Exhibit "A" contain 7,000 square feet; that in all other respects said lots conform to the building of zoning ordinances of North Salt Lake.

11. That the comprehensive zoning ordinances of North Salt Lake which was enacted August 6, 1957, also contains the following provisions:

> 1-11. Nonconforming Building Lots and Uses. The lawful use of any building, structure, or land

existing at the time of the adoption of this ordinance may be continued subject to all of the provisions of Chapter 8 though such building or use does not conform to the regulations of the zone in which it is located, and any nonconforming building lot may be used for any lawful use set forth in the regulations for the zone in which it is located subject to the restrictions set forth in section .....

8-2. CONTINUATION OF NONCONFORMING USES AND SIGNS. Subject to all limitations herein set forth, the operation of a nonconforming use and the maintenance of a nonconforming sign may be continued after the effective date of this ordinance. On or before January 1, 1958, or January 1st of any following year, following the effective date of this ordinance or of any amendment hereto by which the use of sign became non-conforming, the owner or owners of both the land on which a nonconforming use is located, and the structure or structures in which a non-conforming use is located, and the owner of land on which a nonconforming use is located shall register such nonconforming use or sign by filing with the Zoning Administrator a registration statement for such nonconforming use or sign, which shall include a notarized affidavit setting forth the time that such use or sign came into existence, the size of the sign and the size and extent of the nonconforming use existing on the effective date of this ordinance. The Zoning Administrator shall preserve such statements and affiidavits and on the basis of such documents and upon the approval of the Planning Commission, certificates of occupancy shall be issued for each nonconforming use, one copy of which shall be sent to the owner of the nonconforming use or sign, one copy to the license assessor, and one copy shall be retained in the file of the Zoning Administrator. Permits for noncon-

forming signs shall be issued by the Zoning Administrator as if application for permits for new signs were made. A careful record of such signs shall be maintained by the Zoning Administrator.

8-6. Termination of Nonconforming Uses and Signs. (1) By Abandonment. A nonconforming use of a building or a nonconforming use of land or a nonconforming sign which has been abandoned shall not thereafter be returned to such nonconforming use. A nonconforming use or sign shall be considered abandoned (a) when the characteristic equipment and the furnishings of the non-conforming use have been removed and have not been replaced by similar equipment within one year, (b) when the nonconforming sign has been removed, (c) when the building or premises occupied by a nonconforming use are left vacant for a period of one (1) year or more, (d) when the use or sign has been replaced by a conforming use, (e) when the use or sign has been replaced by a use which is not conforming to the provisions of the zone in which it is located. (While the changing of a nonconforming use or sign to a nonconforming or illegal use does terminate the right to continue such nonconforming use, the replacement use shall not be permitted to be operated.) (f) when the intent of the owner to discontinue the use is apparent as evidenced by his failure to register a nonconforming use of land or structure which was not in operation on the effective date of this ordinance, or a nonconforming sign in the manner and within the time required by this chapter.

12. That no registration statement or affidavit has ever been filed with the Zoning Administrator of North Salt Lake covering any non-conforming use in the Paul Subdivision.

13. That after acquiring certain lots in the Paul Subdivision, plaintiffs made application to the Building Department of North Salt Lake for a building permit to construct a dwelling house on Lot 90, which is 60 feet x 100 feet.

14. That the applicants for the building permit have offered to guarantee the installation of the remaining subdivision improvements for said lot, but notwithstanding said fact, the building inspector denied said application and refused to issue a building permit on the ground that said lot fails to comply with the minimum area requirements as set forth in the Comprehensive Zoning Ordinance of North Salt Lake.

15. That on the 11th day of February, 1963, plaintiffs filed a petition for review with the North Salt Lake Board of Adjustment, requesting a reversal of the decision of the Building Inspector; that said petition was heard by the Board of Adjustment on February 25, 1963, and on March 9, 1963, plaintiffs were notified that said petition was denied, but that the Board of Adjustment did not serve copies of its Findings of Fact upon the plaintiffs as required by Section 2-10-5 and Section 2-10-11 (2) of the Comprehensive Zoning Ordinance of North Salt Lake, notwithstanding the fact that demand was made for findings.

Contrary to what is stated in appellant's brief, there is nothing in the record or in the stipulation of facts showing that water connection fees have not been refunded to Modern Housing Corporation or the plaintiffs,

or that any request has been made for any such refund; that sewer lines were not available in the area at the time of the passage of the zoning ordinance; that the area could not be replatted; that water mains have been granted to any water district or easements given; or that any connection tees exist in the water lines.

It is also to be noted that this case does not involve an amendment to an existing zoning ordinance in an attempt to discriminate against any particular subdivider, but rather it involves the passage of a complete comprehensive zoning ordinance, providing a zoning plan for the Town of North Salt Lake (R-9).

ARGUMENT

POINT I.

THE PLATTING AND RECORDING OF A SUBDIVISION DOES NOT EXEMPT THE PROPERTY THEREIN FROM FUTURE ZONING ORDINANCES; NOR DOES IT CREATE ANY VESTED PROPERTY OR CONTRACT RIGHT ON THE PART OF THE DEDICATOR.

1. *The Zoning Ordinance of North Salt Lake Is a Valid and Reasonable Ordinance.*

It is clear in this case that the reason plaintiffs were denied the building permit which they sought was because the building lot in question fails to comply with the minimum area requirements as established by the North Salt Lake Zoning Ordinance. The cases and authorities cited in plaintiffs' brief do not involve the va-

lidity of a zoning ordinance and thus are not applicable to the instant case. They simply hold that the acceptance and recording of a subdivision plat operates as a dedication of the platted streets for public use. The statutes provide a method for the vacating or changing of a subdivision plat (57-5-6, 7, *Utah Code Annotated,* 1953) and the case of *Boskovich* v. *Midvale City Corporation,* 121 Utah 445, 243 P. 2d 435, cited by plaintiffs, holds that a street can be vacated if the proper procedure is followed. It is difficult to see how any private easements could be established over the undeveloped portion of the Paul Subdivision in North Salt Lake, particularly in light of the fact that the proposed streets have never been constructed nor are there any homes or other structures in this area. Further, there is no evidence here of any claim to a private right of way. Nor is there any evidence in this case of the request of the property owners or the refusal of the City of North Salt Lake to vacate the streets. It has been held that the owner or his successor can reclaim the use of dedicated property when the object and purpose of making the dedication have completely failed, *Am. Jur. Dedication, Section* 64; also, that land will revert to the dedicator when the intended use becomes impossible, *Am. Jur. Dedication, Section* 65.

Assuming, however, as plaintiffs have argued, that the filing and acceptance of the subdivision plat operates as an unconditional dedication of the platted streets, it does not follow that a platted subdivision cannot be included in and made the subject of a valid zoning ordinance. Respondent has been unable to find any authority

for such an extreme position and certainly no such authority has been cited by appellants in their brief. To say that zoning ordinances do not apply to property abutting on a dedicated street is to practically nullify the entire purpose of zoning.

A municipality clearly has the power to enact zoning ordinances. This power is given in 10-9-1, *Utah Code Annotated,* 1953, which provides as follows:

> "RIGHT TO REGULATE ZONING. For the purpose of promoting health, safety, morals, and the general welfare of the community, the legislative body of cities and towns is empowered to regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts and other open spaces, the density of population and the location and use of buildings."

The above specifically gives the city the power to impose minimum area requirements. In construing the extent of the zoning power of a municipality, the Utah court has held in *Hargraves* v. *Young,* 3 Utah 2d 175, 280 P. 2d 974, that sideyard requirements are valid and reasonably relate to public health, safety, morals or general welfare. It would be completely unreasonable to assume any different holding with respect to the imposition of minimum area requirements and such requirements have been generally held by the courts to be proper subjects for zoning, *Am. Jur. Zoning, Section* 52.

Some of the leading cases upholding the validity and constitutionality of area requirements in zoning ordi-

nances are *Clemons* v. *City of Los Angeles*, 36 Cal. 2d 95, 222 P. 2d 439, wherein the litigants were prohibited from conveying property in a bungalow court which had existed for a period of twenty years where conveyance of the separate parcels would reduce the individual ownership of lots to a size below the Los Angeles minimum lot size as established by ordinance; and *Simon* v. *Town of Needham*, 311 Mass. 560, 42 N.E. 2d 516, wherein the court observed that a municipality may regulate lot sizes to encourage such things as avoidance of congestion in streets, prevention of overcrowding land, facilitation in furnishing transportation, light, sewer, and other public necessities, provision of sufficient recreational space for children to play, and the cultivation of flowers, shrubs and vegetables.

Nor does the North Salt Lake zoning ordinance deprive plaintiffs of their property without just compensation. Zoning laws are enacted in the exercise of the police power and differ from the right to restrict the use of real property by condemnation with compensation under the power of eminent domain. Thus such zoning laws are ordinarily held not to be invalid as a taking of property for public use without compensation. *Am. Jur. Zoning Section* 19.

It has further been held that zoning ordinances are presumed to be valid; the burden is upon the one assailing the zoning ordinance to overcome the presumption; and every intendment is to be indulged by the court in favor of the validity of the measure. *Am. Jur. Zoning,*

Section 16. All of these presumptions must be applied to this case and there is nothing in the stipulation of facts herein which would in any way show the North Salt Lake Zoning Ordinance to be discriminatory or unreasonable.

2. *Substantial improvements must be constructed on the property before any vested rights can accrue.*

It is conceivable that in rare cases the zoning ordinances of a municipality would not apply where there is an intervention of "vested rights." The concept of vested rights usually involves situations where a municipality issues a building permit and then attempts to revoke the same because of a change in the zoning ordinance. In such cases it has been held that a vested right can accrue when substantial expenditures have been made in good faith by the permittee toward accomplishing the purpose for which the permit was issued. *Metzenbaum Law of Zoning,* page 1167.

It has also been held that no vested right can accrue where no building permit has been issued. *Price v. Schwafel,* 92 Cal. 77, 206 P. 2d 683; *Metzenbaum Law of Zoning,* page 1171.

The following cases hold that the expenditures were not substantial enough to establish a vested right:

In *Wheat* v. *Barrett,* 210 Cal. 193, 290 Pac. 1033, the permittee was held to have acquired no vested right after the passage of a new zoning ordinance even though he had contracted for the erection of the building and had

dug 610 feet of trench and erected 84 feet of concrete forms, the excavation costs amounting to $1,000.00.

The cases further hold that a municipality does not deprive one of vested rights by preventing construction of a building or use of property forbidden by the zoning ordinance or an amendment thereto, even though prior to enactment of the ordinance or amendment the protesting party owned the land, *Darlingtown* v. *Frankfort,* 282 Ky. 778, 110 S.W. 2d 392; incurred travel expenses and had tentative plans made, *Rice* v. *Van Vranken,* 232 NYS, 506; removed shrubbery, cut down trees and negotiated for a lease, *Brady* v. *Keene,* 90 N.H. 99, 4 A. 2d 658; leased land and spent a large sum on proposed oil drilling operations, *Marblehead Land Company* v. *Los Angeles,* 36 F. 2d 242; purchased land with the intent to use it for a particular purpose, *O'Rourke* v. *Teeters,* 63 CA 2d 349, 146 P. 2d 983; purchased land, let building construction contracts, and started construction, *Tucson* v. *Arizona Mortuary,* 34 Ariz. 495, 272 Pac. 923; secured approval of a plot plan, made expenditures in obtaining permits to cut curbs and install tanks, and applied for, but had not received a building permit, *Sun Oil Company* v. *Clifton,* 13 N. J. 89, 80 A. 2d 258; applied for a building permit but before its issuance ordered structural steel, special windows and excavating, *Atlas* v. *Dick,* 86 NYS 2d 231; obtained a building permit and entered into contracts with third persons for construction of a building, *Brett* v. *Building Commissioner of Brookline,* 250 Mass. 73, 145 N.E. 269; obtained a building permit and then a zoning ordinance was adopted prohibiting the use and

thereafter construction work was done and liabilities incurred, *Sun Oil Company* v. *Bradley Beach,* 136 N. J. 307, 55 A. 2d 778; spent money but made no tangible change in the land itself by excavation or construction, *Rice* v. *Van Vranken,* 232 NYS 506; and acquired title to land, obtained a building permit, made a contract for construction of the building, and a small amount of preliminary work was done by the contractor, *Bregman* v. *Reville,* 226 NYS 285.

3. *The facts of this case do not establish any vested rights.*

The most that can be said about plaintiffs in the instant case is that they purchased the land in hopes of constructing on the nonconforming property. When plaintiffs purchased the lots in question in 1963 they were presumed to know of the existence of the North Salt Lake Zoning Ordinance. Their predecessors installed a water line and paid some water connection fees, but there is no evidence whatsoever that these improvements were of a substantial nature. The installation of sewer lines and sewer connection tees cannot be considered because this was done long after the passage of the zoning ordinance and would therefore have been done at plaintiffs' risk.

There is also nothing in the record whatsoever that indicates plaintiffs will suffer any pecuniary loss from the operation of the zoning ordinance. It is true that two lots will be lost if the area is replatted, however, it is logical to assume that if the size of the lots is increased,

the market value of the lots will be increased. There is no evidence to the contrary.

It should also be noticed from Exhibits "A" and "B" that the developed portion of the Paul Subdivision has been amended to conform with the North Salt Lake Zoning Ordinance. It would be undesirable to permit new construction on smaller lots which would back against the larger lots in the amended Paul Subdivision.

It is clear that plaintiffs have acquired no vested rights. The City of North Salt Lake has a legitimate interest in the welfare of the community and desires to prevent any new construction on substandard lots.

POINT II.

IN THE EVENT PLAINTIFFS' PREDECESSORS HAD ESTABLISHED ANY VESTED RIGHTS OR NONCONFORMING RIGHTS AT THE TIME OF THE PASSAGE OF THE NORTH SALT LAKE ZONING ORDINANCE, SAID RIGHTS HAVE SINCE BEEN ABANDONED.

The undeveloped portion of the Paul Subdivision has remained dormant since its dedication in 1955. The North Salt Lake Comprehensive Zoning Ordinance was passed on August 6, 1957. The ordinance provided for the continuation of non-conforming uses and then provided in Section 8-6 that any such nonconforming use shall be deemed abondoned when the premises are left vacant for a period of one year or more. Appellants have argued that Section 8-6 is not applicable because

of the inadvertence of the City Council in not asserting the section number in Section 1-11, the general section providing for the continuation of nonconforming uses. However, it is to be noted that Section 1-11 specifically provides that it is "subject to all of the provisions of Chapter 8" and this would include Sections 8-2 and 8-6. The nonconforming use sections also specifically refer to the "nonconforming use of land." Ordinances must be construed in such a manner as to give them meaning and not in a manner as would make them meaningless or absurd. *Johanson* v. *Cudahy Packing Company,* 107 Utah 114, 152 P. 2d 98.

The only real question is whether such an abandonment statute is constitutional and it is generally held that time limitations in an ordinance relating to non-conforming uses of property are valid and proper. See *Metzenbaum Law of Zoning,* page 1247.

The Utah court, in conformity with other jurisdictions, has recently upheld the validity of a one-year abandonment statute. *Morrison* v. *Horne,* 12 Utah 2d 131, 363 P. 2d 1113.

Another leading case is *Frammor Realty Corporation* v. *LeBoeuf,* 104 NYS 2d 247, wherein an ordinance set twelve months of discontinuance as a bar towards resumption of a nonconforming use. The court held the ordinance to be reasonable and proper, even though there was no evidence of an intended abandonment. The language of the court is as follows:

> "It seems clear that in this case there was no evidence whatsoever of any affirmative act on the

part of the petitioner which might be construed or deemed to be a voluntary abandonment herein. All that appears in the record is that there was a non-user for several years. As heretofore pointed out, some of this period embraced the war years when restrictions on gasoline forced the closing of the station.

However, the respondent [the municipality] relies on Section 900, subdivision 4 of the Zoning Ordinance above quoted. The respondent construes this section to mean that the mere fact that the business was discontinued for more than one year, results in an abandonment regardless of whether or not there was any intention to abandon the nonconforming use.

. . . This leaves one remaining query: Is the ordinance, insofar as it attempts to abolish a nonconforming use after non-use for one year, valid and constitutional?

In this connection it must be borne in mind that the policy of the law is the gradual elimination of nonconforming uses, and, accordingly, ordinances should not be given an interpretation which would permit an indefinite continuation on the nonconforming use. McQuillan on Municipal Corporations, Third Edition, Volume 8, Section 8, Section 25.189 and cases cited . . .

The courts have gone far in holding that mere non-use for a specified period of time may terminate the nonconforming use. See Standard Oil Company v. City of Tallahassee, 183 F. 2d 410.

It seems well-established by the decisions that ordinances such as the one at bar are valid and constitutional. The only question that might arise in each case is the reasonableness of the period of time set forth in the ordinance. The court is satis-

fied that the period of a year in the ordinance herein is a reasonable one."

See also *Beszedes* v. *Board of Commissioners of Arapahoe County,* Colo. 178, P. 2d 950.

In the case at bar no building permit was requested on the lot in question until 1963. This is over seven years from the date of dedication of the subdivision. Thus any vested rights or established nonconforming use have now long been abandoned.

POINT III.

APPELLANTS CANNOT COMPLAIN OVER THEIR OWN SELF-INFLICTED HARDSHIP.

Appellants Jack B. Wood and Shirl W. Hales purchased the property in question in January of 1963. This was more than five years after the passage of the North Salt Lake Comprehensive Zoning Ordinance. Thus, at the time of this purchase appellants had either actual or constructive notice of the existing zoning regulations.

In a well-reasoned decision involving a similar fact situation, the Colorado Supreme Court in the case of *Levy* v. *Board of Adjustment of Arapahoe County,* 369 P. 2d 991, held that a self-inflicted hardship is a highly significant fact which is a material element bearing on the issue of the propriety of the refusal to grant a variance and weighs heavily against a property owner seeking a variance.

CONCLUSION

Based upon all of the foregoing authorities, respondent respectfully requests that the decision of the North Salt Lake Board of Adjustment and the Davis County District Court be affirmed.

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